

Response Deadline: November 21, 2013 at 5:00 p.m.
Hearing Date and Time: December 17, 2013 at 2:00 p.m.

VINSON & ELKINS LLP
Steven Abramowitz (SA 1782)
Laurel Fensterstock (LF 0528)
666 Fifth Avenue
26th Floor
New York, New York 10103
Tel: (212) 237-0000
Fax: (212) 237-0100
sabramowitz@velaw.com
lfensterstock@velaw.com
Attorneys for Al Imtiaz Investment Company K.S.C.

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

IN RE: :
: Chapter 11
ARCAPITA BANK B.S.C.(c), *et al.*, :
: Case No. 12-11076 (SHL)
Reorganized Debtors. :
: Jointly Administered
: :
: :

x

**RESPONSE OF CREDITOR AL IMTIAZ INVESTMENT
COMPANY K.S.C. TO THE REORGANIZED DEBTORS’ OMNIBUS REPLY TO
CERTAIN RESPONSES TO SECOND OMNIBUS OBJECTION TO CLAIMS**

Claimant Al Imtiaz Investment Company K.S.C. (“Al Imtiaz”), a Kuwaiti Shareholding Company, by and through its counsel, Vinson & Elkins LLP, respectfully submits this response (the “Response to the Reply”) to the Reorganized Debtors’ Omnibus Reply to Certain Responses to Second Omnibus Objection to Claims filed by Arcapita Bank B.S.C(c) (“Arcapita” and together with certain of its subsidiaries and affiliates¹, the “Debtors”) dated November 7, 2013

¹ The related Debtors are Arcapita Investment Holdings Limited, Arcapita LT Holdings Limited, WindTurbine Holdings Limited, AEID II Holdings Limited, RailInvest Holdings Limited, and Falcon Gas Storage Company, Inc.

(the “Reply”) (Dkt. 1670). In support of its Response to the Reply, Al Imtiaz states as follows:

BACKGROUND

1. Al Imtiaz is a creditor of Arcapita and filed a proof of claim on August 30, 2012, [Claim No. 517] in an amount not less than \$1,366,633.00 (the “Proof of Claim”, a copy of which is attached hereto as Exhibit A). Al Imtiaz, in its capacity as a creditor under such Proof of Claim, is a party-in-interest in these cases.

2. From approximately 2005-2011, Al Imtiaz entered into a series of Arcapita-sponsored transactions through which it invested in certain of the non-Debtor Syndication Companies and/or Transactions Holdcos, including Arcapita Ventures I Limited (together, the “Arcapita Funds”).² See e.g., Ex. A, 10 (filed with Proof of Claim). Except with respect to the proceeds arising from the Prenova Exit described below that the Debtors specifically promised to pay prior to the Petition Date, Al Imtiaz has not included its investments in the various non-Debtor Arcapita Funds in the Proof of Claim.

3. The following rendition of facts is based totally on the documents included in Al Imtiaz’ Proof of Claim, which are further referenced in the attached Declaration of Laurel S. Fensterstock in Support of the Response of Creditor Al Imtiaz Investment Company K.S.C. to the Reorganized Debtors’ Omnibus Reply to Certain Responses to Second Omnibus Objection to Claims (the “Fensterstock Decl.”).

4. Prior to the Petition Date, on or around November 30, 2011, Arcapita sent an email communication to Al Imtiaz discussing, among other things, terms relating to Al Imtiaz’ agreement to fund a fourth capital call, and memorializing, as noted in such email

² Terms not otherwise defined shall have the meaning ascribed to them in the Second Amended Joint Plan of Reorganization of Arcapita Bank B.S.C.(c) and related Debtors Under Chapter 11 of the U.S. Bankruptcy Code (with First Technical Modifications), dated June 11, 2013 (the “Plan”).

communication, the results of an in-person meeting between Arcapita and Al Imtiaz in Kuwait that took place on November 21, 2011. Fensterstock Decl. ¶ 3; *See also* Ex. B (filed with Proof of Claim). That email communication states, among other things,

Furthermore, and as promised verbally, that the proceeds from the prenova exit and the CardioMEMS exit should be transferred to Al Imtiaz's bank account no later than 30th November 2011 and 31st December 2011 respectively. Also note that in the event that Arcapita fails to transfer the said proceeds to Al Imtiaz's account on the above underlined mentioned dates then Arcapita shall be liable to refund Al Imtiaz investment company the fourth capital call of US \$4,000,000/- along with any outstanding proceeds of the exits within 30 days from 31st December 2011.

5. Thus, it is clear from the communications by Arcapita to Al Imtiaz that Arcapita agreed to pay Al Imtiaz directly the proceeds of the Prenova Exit and transfer said proceeds to Al Imtiaz. This agreement constituted a right to payment for Al Imtiaz and the breach thereof by Debtors is a supporting basis for Al Imtiaz' claim. The Debtors' attempt to assert in its Reply that its only obligation was to make a payment to Arcapita Ventures is misguided and contradicted by this evidence.

6. In addition, on or around January 11, 2012, Arcapita sent Al Imtiaz a letter stating that Arcapita Ventures I Limited had successfully achieved as its second exit the sale of its interests in Prenova, Inc. (the "Prenova Exit") and that a total of \$1,336,633 "have been credited to your Investment account on December 20, 2011." Fensterstock Decl. ¶ 4; *See also* Ex. C (filed with Proof of Claim). On or around that same day, Arcapita also sent Al Imtiaz a separate letter stating that Arcapita would transfer to Al Imtiaz proceeds of the Prenova Exit during February 2012 and, in the meantime, the proceeds that were in the investment account would earn an annualized Murabaha rate of 4%. Fensterstock Decl. ¶ 5; *See also* Ex. D (filed with Proof of Claim, and together with the email communication referenced in the previous paragraph

and first letter referenced in this paragraph, the “Letters”). Al Imtiaz asserts that receipt by the Debtor Arcapita of the funds arising from the Prenova Exit and the terms of the Letters from Arcapita to Al Imtiaz create, under applicable law, a “right to payment” against Arcapita, and consequently a “claim” under 11 U.S.C. § 101(5).

7. Arcapita did not transfer the proceeds of the Prenova Exit to Al Imtiaz’ bank account, as promised in the Letters, even though, as stated, the proceeds had previously been “credited” to and earning interest in Al Imtiaz’ investment account.

8. On or about March 19, 2012, Arcapita filed its bankruptcy petition and initiated the above-captioned cases.

9. On or about August 30, 2012, under compulsion of the bar date, Al Imtiaz filed the Proof of Claim with the United States Bankruptcy Court for the Southern District of New York in the above-captioned action relating to the Debtors’ failure to pay the promised amount arising from the Prenova Exit. Specifically, its claim relates to the funds that Al Imtiaz asserts the Debtors agreed to pay it following receipt, were in fact received by the Debtors and credited to Al Imtiaz’ investment account along with a further agreement to pay, all as set forth in the Letters, but for which the Debtors failed to comply. *See* Ex. A.

10. On or about April 26, 2013, the Debtors filed their Second Omnibus Objection to Claims (the “Objection”) (Dkt. 1050), which Objection states “Al Imtiaz asserts a claim for its equity investments in non-Debtor entities and that the Debtors do not have any liability for such interests.” *See* Objection, Schedule 1.

11. On or about October 3, 2013, Al Imtiaz filed its Response to the Objection (the “Response”) (Dkt. 1591) asserting, among other things, that Arcapita failed to provide Al Imtiaz

with information supporting the Objection or demonstrating that Al Imtiaz does not have a valid claim against the Debtors. And, further, that the Objection itself provided no support for disallowing the claim of Al Imtiaz on the ground asserted in the Objection. *See* Response.

12. On or about November 7, 2013, the Debtors filed their Omnibus Reply to Certain Responses to Second Omnibus Objection to Claims (the “Reply”) (Dkt. 1670), which Reply states “[a]s stated in the Star Affidavit, as of the Petition Date, Al Imtiaz’s \$1,336,633 in Deal Proceeds from the Prenova sale had not yet been transferred to Al Imtiaz’s URIA. The Bank has scheduled an undisputed claim for Arcapita Ventures that indirectly encompasses Al Imtiaz’s claim for these Deal Proceeds. Accordingly, claim no. 517 should be disallowed.” Reply ¶ 10 (internal citations omitted).

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13. As set forth in the Letters, prior to the Petition date, (i) Arcapita directly agreed with Al Imtiaz, in connection with Al Imtiaz’ agreement to fund a capital call, to pay it the proceeds of the Prenova Exit, and (ii) following such exit, Arcapita informed Al Imtiaz that (1) it had credited Al Imtiaz’ investment account the proceeds it received from the Prenova Exit, Fensterstock Decl. ¶ 4; (2) such proceeds would earn an annualized Murabaha rate of 4% while in the investment account; and (3) the funds would be transferred to Al Imtiaz’ bank account during February 2012. Fensterstock Decl. ¶ 5.

14. In contrast to the statements made by Arcapita in the Letters, Arcapita now argues in its Reply that as of the Petition Date, the funds had not yet been transferred to Al Imtiaz’ investment account. Even if this assertion is true, the failure of Arcapita to comply with its promises and the breach of its representations entitle Al Imtiaz to a claim against the Debtors in the amount of at least \$1,336,633 plus interest accrued prior to the Petition Date.

15. Nothing in this Response shall be construed as a waiver of any rights or limitation on remedies of Al Imtiaz against the Debtors or any other Person, including, without limitation, any Arcapita Fund, all of which are hereby preserved or reserved.

CONCLUSION

16. WHEREFORE, for the reasons set forth above and in Al Imtiaz' Response, Al Imtiaz respectfully requests that this Court (i) deny the Debtor's Objection to Al Imtiaz' Claim in all respects, and (ii) grant such other relief as is appropriate under the circumstances.

Dated: November 21, 2013
New York, New York

Respectfully submitted,

VINSON & ELKINS LLP

By: /s/ Steven Abramowitz
Steven Abramowitz (SA 1782)
Laurel Fensterstock (LF 0528)
666 Fifth Avenue
26th Floor
New York, New York 10103
Tel: (212) 237-0000
Fax: (212) 237-0100
sabramowitz@velaw.com
lfensterstock@velaw.com

*Attorneys for Al Imtiaz Investment
Company K.S.C.*